



Birya t/a Bii Enterprises v Jilani (the Administrator of the Estate of Kevin Mwamuye Jilani) & 3 others (Environment & Land Case 85 of 2016) [2023] KEELC 574 (KLR) (8 February 2023) (Judgment)

Neutral citation: [2023] KEELC 574 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 85 OF 2016
MAO ODENY, J
FEBRUARY 8, 2023**

BETWEEN

LANFRANCUS WASI BIRYA T/A BII ENTERPRISES PLAINTIFF

AND

JOEL NGALA JILANI (THE ADMINISTRATOR OF THE ESTATE OF KEVIN MWAMUYE JILANI) 1ST DEFENDANT

CHARO KENNEDY KAZUNGU 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

CHIEF LAND REGISTRAR 4TH DEFENDANT

JUDGMENT

1. By a Plaintiff dated 15th April 2016, the Plaintiff herein sued the Defendants jointly and severally seeking the following orders:
 - a. A permanent injunction order restraining the 1st Defendant from transferring Plot No. Subdivision No. Group V/605 (Original No. 507/98) with Land Survey No. 248358, being CR 39322/1 to the 2nd Defendant and further order directing the 1st Defendant to surrender the original title document to the Plaintiff.
 - b. A prohibitory order directed to the 4th Defendant prohibiting him from effecting the transfer of the suit plot to any other person other than the Plaintiff.



- c. A declaration that the Plaintiff is the rightful owner of the suit plot and an order directing the 4th Defendant to transfer this plot to the Plaintiff.
 - d. Costs of the suit.
 - e. Interest as court rates.
 - f. Any other relief the Honourable court may deem fit and just to offer.
2. PW1 Lanfrancus Wasi Biryia adopted his statement dated 15th April 2016 and testified that the late Kevin Mwamuye was his friend whom he would assist financially whenever he needed to purchase building materials.
 3. It was his further testimony that the last loan he gave the deceased was Kshs. 700,000/- which he offered to pay back with land. He added that due to their relationship and trust, they did not have any written agreement but the deceased took him to the directors of Kilifi Plantations Limited (the vendor) where he signed a transfer which he produced as an exhibit.
 4. PW1 also stated that the late Kevin Mwamuye instructed Kilifi Plantations Director Christopher Wilson to do a direct transfer to the plaintiff's company Bii Enterprises which was done and was given the title and transfer documents which he took to his advocates' clerk one Eli Samuel.
 5. Upon cross-examination by Mr. Mwadilo, counsel for the 1st and 2nd Defendants, the Plaintiff told the court that he was informed of the missing title in the year 2010 after the burial of Kevin Mwamuye. He also confirmed that the date indicated on the transfer was 26th April 2010.
 6. Christopher Denis, PW2, and a director at Kilifi Plantations Limited, testified that the late Kevin Mwamuye purchased the suit property from the company and instructed him to transfer the same directly to the Plaintiff. The directors then signed the transfer and handed the title documents to the Plaintiff. Later on, the Plaintiff informed them that the title was missing which prompted the company to procure a provisional title for the Plaintiff. PW2 stated that they never signed any transfer in favour of the 2nd Defendant.
 7. DW1 Joel Ngala relied on his statement dated 9th May 2016 and list of documents dated 3rd July 2019 which included a certificate of confirmation of grant, receipts from Kilifi Plantations which the deceased paid the purchase price with, a copy of sale agreement between the deceased and Kilifi Plantations, copy of transfer from Kilifi plantations to the plaintiff's Bii Enterprises, copy of a letter to the Registrar and copy of county rates clearance certificate copy of title deed and deed plan.
 8. On cross-examination, by counsel, DW1 stated that he knew about the suit property in the year 2010 after the demise of his brother, Kevin Mwamuye. He added that he was not aware of the meeting between Kevin, the Plaintiff and the vendor; but that he got the original title from his other brother who got the title from one Eli Kazi who was a clerk to the Plaintiff's advocate.
 9. DW2 Livingstone Jilani adopted his statement dated 9th May 2016 and testified that deceased was his brother and admitted that the deceased owed some people money but the Plaintiff was not one of them. Regarding the title to the suit property, DW2 told the court that the same was given to them after the deceased's demise by Eli. Upon cross examination, the witness testified that when he was given the title document, the registered owner was Kilifi Plantations Limited.



Plaintiff's Submissions

10. Counsel for the Plaintiff filed submissions but the defendants never filed submission as directed by the court. Counsel reiterated the contents of the pleadings and evidence and submitted that the Director of Kilifi Plantations gave evidence and confirmed that he had sold the land to Kevin Mwamuye and signed a transfer to Bii Enterprises ltd as directed by the deceased.
11. Counsel further submitted that the plot owner testified on behalf of his company Kilifi Plantations Ltd and stated that the only Transfer he signed was between the Company and the Plaintiff's firm (Bii Enterprises).
12. That it should be noted that land was being transferred from the 1st Defendant as the Administrator of the Estate of Kelvin Mwamuye Jilani to the 2nd Defendant a Mr. Charo Kennedy Kazungu but the land is still registered in the names of Kilifi Plantations Ltd todate, hence the land could not be transferred the 2nd Defendant without the directors of Kilifi Plantations Ltd signing the transfer document.
13. Counsel urged the court to allow the Plaintiff's claim and dismiss the Defendant's counterclaim with costs.

Analysis And Determination

14. The issues for determination is who is the rightful owner of the suit land and whether the Plaintiff is entitled to the orders sought.
15. It was not in dispute that the deceased, Kevin Mwamuye, purchased the suit property from Kilifi Plantations Limited which was confirmed by PW2 a Director who stated that he had been instructed to transfer the suit plot to the Plaintiff. PW2 Christopher Wilson produced a Confirmation letter which stated as follow: -

"I Christopher Denis Wilson one of the directors of Kilifi Plantations Ltd, C/o Private Bag Kilifi do hereby confirm that in the month of April 2010 the company sold plot No. Group V/605 (507/98) approx. 0.0570 Ha to Kelvin Mwamuye Jilani for a consideration of Kshs. 500,000/= which he fully paid to the company.

I further confirm that the said Kelvin Mwamuye Jilani instructed me to do a direct transfer from the company Kilifi Plantations Ltd to Lanfrancus Wasi Biryia through his company Bii Enterprises which I did on the 26th April 2010.

I am not in position to know why he told me to transfer the land to a third party instead of himself.

I am aware that Mr. Kelvin Mwamuye Jilani passed on but I did sign the transfer on 26th April 2010 when he was still alive.

That is all I wish to confirm.

Signed.....

16. PW2 confirmed that the suit property was sold to the late Kevin Mwamuye who instructed him to do a direct transfer to Lanfrancus Wasi Biryia through his company Bii Enterprises Ltd which he did on 26th April 2010 and stated that he signed the transfer while Kevin Mwamuye was still alive.
17. The documents produced by DW1 were in respect of the deceased transaction in respect of the suit land with Kilifi Plantations and the direct transfer to Bii Enterprises. The only document that emanated



from the Defendant was the certificate of confirmation of grant. The receipts from Kilifi Plantations which the deceased paid the purchase price with, a copy of sale agreement between the deceased and Kilifi Plantations, copy of transfer from Kilifi plantations to the Plaintiff's Bii Enterprises, copy of a letter to the Registrar and copy of county rates clearance certificate copy of title deed and deed plan were documents that authenticate that there was a transaction between the Plaintiff and the deceased which was confirmed by the transfer signed by the plaintiff and PW2.

18. PW2 confirmed that he did a direct transfer to Bii Enterprises Ltd upon the instructions of the late Kevin Mwamuye on 26th April 2010.
19. By the time the Certificate of Confirmation of grant was issued to Joel Ngala Jilani and Josephine Munyazi Jilani on 20th December 20112 the suit property was still registered in the name of Kilifi Plantations Ltd and therefore the property could not have formed part of the Estate of Kevin Mwamuye (deceased).
20. DW1 Joel Ngala who was one of the Administrators wrote a letter dated 17th March 2016 to the Registrar of Titles Mombasa complaining about the issuance of a provisional certificate and yet he had the original title. This confirms that by the time he got the certificate of confirmation of grant the original title which he claimed to be in possession of was still in the name of Kilifi Plantations. This is further corroborated by the production of certificate of title and the Deed Plan.
21. DW2 also stated to the court that he was aware that his deceased brother owed people money and from the evidence on record it points to the fact that the deceased sold the suit land to the Plaintiff and a transfer was legally signed by the vendor Kilifi Plantations and the Plaintiff.
22. This is a case where the 1st Defendant a brother to the deceased wanted to benefit where he did not sow by including the suit property which had been sold to the Plaintiff as one of the properties to be administered.
23. I find that the Plaintiff has proved that he is the rightful owner of the suit land and make the following specific orders;
 - a. A permanent injunction is hereby issued restraining the 1st Defendant from transferring Plot No. Subdivision No. Group V/605 (Original No. 507/98) with Land Survey No. 248358, being CR 39322/1 to the 2nd Defendant and order that the 1st Defendant do surrender the original title document to the Plaintiff within 14 days.
 - b. A declaration is hereby issued that the Plaintiff is the rightful owner of the suit plot and the 4th Defendant is hereby directed to transfer the suit plot to the Plaintiff.
 - c. The 1st and 2nd Defendants to pay Costs of the suit.
 - d. The defendants' counterclaim is dismissed with costs

DATED, SIGNED AND DELIVERED AT MALINDI THIS 8TH DAY OF FEBRUARY 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

